United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7544

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7544

RICHARD S. KAYE,
Plaintiff-Appellant,

against

FUNDING SYSTEMS CORPORATION,
Defendant-Appellee,

and

EQUIMARK CORPORATION,
Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE FUNDING SYSTEMS CORPORATION

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BRIEF OF DEFENDANT-APPELLEE
FUNDING SYSTEMS CORPORATION

Preliminary Statement

This brief is submitted on behalf of defendant-appellee Funding Systems Corporation ("FSC") in opposition to the appeal of plaintiff-appellant Richard S. Kaye ("Kaye") from the order entered on September 29, 1976 by Judge Robert L. Carter of the District Court for the Southern District of New York dismissing the complaint against FSC.

Counter Statement of Questions Presented

1. Does the holding of annual shareholders' meetings by FSC in 1975 and 1976, and the solicitation of proxies in connection with those annual meetings, render moot the request for an order rescheduling the 1974 annual meeting or, in the alternative, for an order requiring FSC to hold a new 1974 annual meeting?

2. Do Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n, and Rule 14a-9 thereunder, 17 C.F.R. §240.14a-9, require the disclosure now by FSC of allegations concerning the relationship between FSC and Equimark Corporation ("Equimark"), where Equimark sold its FSC stock in 1975 and the District Court dismissed the amended complaint against Equimark as moot?*

Counter Statement of the Case

On December 20, 1974, by an Order to Show Cause (A-50), Kaye commenced this action against FSC and Equimark.

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* This appeal has been consolidated with the appeal from the dismissal of the case against Equimark, Docket No. 76-7272. Parenthetical references to the Joint Appendix Filed in No. 76-7272 bear the prefix "A-"; citations to the Supplemental Appendix filed in this appeal bear the prefix "SA-".

The complaint (A-1-14) insofar as it related to FSC, alleged that FSC's proxy statement distributed in connection with its annual meeting scheduled for December 27, 1974, was false and misleading in violation of Section 14(a) of the Exchange Act and Rule 14a-9 thereunder. The gravamen of the complaint was that the proxy statement failed to disclose certain facts relating to Equimark's role as the majority shareholder of FSC (A-2-9). Kaye sought a preliminary injunction enjoining FSC from holding its annual meeting until after the distribution of a new proxy statement (A-10). Judge Carter, in a decision issued from the bench on December 26, 1974, enjoined FSC from holding the annual meeting (A-189-96). On that same day, however, FSC appealed the District Court's order (A-197-98) and a unanimous panel of this Court reversed the District Court. The annual meeting proceeded as scheduled (A-199).

Only three items of business were acted upon at the 1974 meeting: (1) the appointment of auditors, (2) the election of directors, and (3) the consideration of three shareholders resolutions submitted by plaintiff. As to the first item, the directors elected have long since completed their term and been replaced by new directors elected at FSC's 1975 and 1976

annual meetings. Similarly, the auditors selected at the 1974 meeting have long since completed their audit and new shareholder action has been taken appointing different auditors at the 1975 and 1976 annual meetings. Kaye's proposals were defeated at the 1974 meeting. They were resubmitted to the 1975 annual meeting and were defeated again. Kaye made no complaints concerning the proxy materials for the 1975 meeting, nor did he seek to prevent it. His proposals were not submitted for consideration at the 1976 meeting (SA-8-10).

In his amended complaint (A-215-30), filed after this Court reversed Judge Carter and after the 1974 annual meeting, Kaye repeated the allegations of his original complaint (A-215-23) and asked that the Court require disclosure of allegations concerning Equimark's involvement in FSC's business affairs and declare the 1974 meeting null and void. In addition, Kaye sought an order mandating a rescheduled 1974 meeting or, alternatively, a new shareholders' meeting. (A-225-26). In neither the original complaint nor the amended complaint has Kaye sought monetary damages.

In 1975, Equimark sold all its shares in FSC. Equimark thereupon moved to dismiss the complaint against it for lack of subject-matter jurisdiction and mootness (A-358-88).

Kaye opposed the motion on the ground that Equimark's sale of its FSC stock was a sham and that he should be given a further opportunity to conduct discovery with respect to that contention (A-389-99). Judge Carter dismissed the amended complaint against Equimark for mootness,holding that Kaye had failed to establish the sale was a sham and that he had had more than ample opportunity to conduct discovery to support his claim that the sale of stock was a sham (A-536-42).

Shortly after the case against Equimark was dismissed, FSC also moved to dismiss the amended complaint on the ground of mootness (SA-6-10). In an opinion dated September 29, 1976 (SA-17-19) the District Court granted FSC's motion. Judge Carter held that Kaye's request for a declaration that the 1974 meeting was null and void and for a rescheduling of the 1974 meeting, or for an order requiring that a new meeting be held, were rendered moot because two subsequent annual meetings had been held. The District Court also held that Kaye's attempt to compel disclosure by FSC of facts relating to Equimark was moot in light of the Court's previous determination, in its May 6, 1976 opinion dismissing the complaint against Equimark (A-536-42), that Equimark had divested itself of its FSC stock in 1975 and that Kaye had failed to substantiate his claims that the sale was a sham.

Kaye has appealed from those dismissals and the appeals have been consolidated.

Argument

POINT 1

THIS ACTION HAS BEEN MOOTED BY FSC'S TWO ANNUAL MEETINGS AND PROXY STATEMENTS SINCE 1974

As this Court has recently stated, "[t]here are few principles as firmly and as deeply embedded in our jurisprudence as the proposition that federal courts will not issue opinions unless a valid and continuing controversy exists between the litigants." Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811, 817 (2d Cir. 1975). See also, e.g., SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S. Ct. 577, 30L.Ed.2d 560 (1972); North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402, 30L.Ed.2d 414 (1971).

In order to be justiciable, a lawsuit must present the court with "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what

the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241, 57 S. Ct. 461, 464, 81 L.Ed. 617 (1937). The Court below, applying these fundamental principles, correctly concluded that Kaye's claims against FSC had become moot and must be dismissed.

The mootness of Kaye's claim is self-evident: it is obvious that reconvening the 1974 meeting and re-soliciting proxies therefor at this date would be a totally useless exercise. As pointed out above, the auditors selected in 1974 have long since completed their audit, the directors have long since completed their terms, and the three shareholder resolutions considered have long since been submitted to and rejected by a subsequent meeting -- for which a new proxy statement was prepared and new proxies solicited -- all without complaint by Kaye. Whatever infirmities there may have been in the 1974 annual meeting and the proxies solicited therefor (and FSC denies there were any infirmities), they are now moot.

The District Court, in dismissing the complaint against FSC for mootness, relied chiefly on this Court's decision in Browning Debenture Holders' Committee v. DASA Corp., supra. The facts upon which this Court affirmed

the dismissal in Browning are virtually identical to the facts of the case at bar. The complaint in Browning alleged that proxy materials sent out in connection with an annual meeting of the defendant corporation were false and misleading in violation of Section 14(a). As here, the plaintiffs in Browning did not seek monetary damages. Also as here, the directors and auditors selected at the meeting had completed their terms and the defendant corporation had subsequently held another annual meeting.

The District Court in Browning had dismissed the Section 14(a) claims on the ground that, whatever violations may have occurred in the solicitation of proxies, the subsequent annual meetings had rendered moot questions relating to the annual meeting at issue. This Court affirmed the dismissal, stating:

> "...The year 1972, everyone would agree, is over, and it is therefore impossible to enjoin the meeting already held.
>
> Both sides apparently acknowledge that the issue of the 1972 meeting and proxy solicitation materials would not be moot if plaintiffs asserted a claim for monetary damages stemming from the conduct and preparation of the 1972 meeting. Since, however, we cannot enjoin a meeting already held, the Browning group in effect merely seeks declaratory relief (i.e., a declaration that

> the 1972 meeting was conducted illegally). Judge Griesa therefore held that continuing with the lawsuit (as it pertains to [the Section 14(a) claims]) would be an empty exercise resulting, at most, in a judicial declaration of no practical import." 524 F.2d 811 at 814.

Nor is Browning an isolated case. Consistent with it and equally dispositive of the instant matter is Isaacs Brothers Co. v. Hibernia Bank, 481 F.2d 1168 (9th Cir. 1973), another decision dismissing a 14(a) action as moot under circumstances similar to those in this case. As here, the plaintiff in Isaacs claimed that an annual meeting's rejection of certain shareholder resolutions he had presented was tainted by an allegedly misleading proxy statement, and sought a court order requiring a new meeting to reconsider them. Also as here, the resolutions in question had been resubmitted to the next annual meeting and again defeated. On these facts, the court held that the resubmission and defeat of the proposals at the next meeting had rendered the entire matter moot, and dismissed the action.

As this Court said in Browning Debenture Holders' Committee, supra, at p. 816:

> "It is well to recall Justice Clark's exact words in Borak: private §14(a) actions should be authorized when they 'make effective the congressional purpose' of the securities laws. (Emphasis added). Under this test, the first two Browning claims should fail since, as a practical matter, they will not effect anything."

Here, declaring the 1974 meeting void and ordering a new one would be an exercise in futility. Very little happened at the 1974 meeting. The directors and auditors appointed then have long since departed. Kaye's proposals, which were defeated in 1974, were defeated again in 1975 and not resubmitted in 1976.

POINT II

SECTION 14(a) DOES NOT REQUIRE DISCLOSURE OF ALLEGATIONS RELATING TO EQUIMARK WHICH SOLD ITS FSC STOCK IN 1975

Kaye argues in this appeal that the information with respect to Equimark's purchase of FSC stock and its control of FSC is somehow material to the current affairs of FSC. Of course, neither the Court nor FSC are told how this information could be of current materiality to any specific corporate activity of FSC. Obviously, it is not.

Equimark sold its FSC shares in 1975. This led Judge Carter to dismiss the case against Equimark as moot. The case against Equimark itself being moot, it can hardly be argued that FSC at this late date is somehow required to inform its stockholders of the unproven allegations concerning Equimark made in the amended complaint.

For after several years of litigation, the allegations in the amended complaint remain just that, unsupported allegations. Two annual meetings have come and gone since the amended complaint was filed. As noted above, the directors and auditors appointed in 1974 have been replaced. Kaye's proposals were resubmitted at the 1975 annual meeting and defeated again. Kaye did not object to the proxy material. He did not resubmit the proposals in 1976.

Equally without merit is the argument that the failure to disclose is continuing and therefore not moot. This argument, of course, assumes that the failure to disclose in the first place was a violation. Kaye has failed to establish this after more than two years of litigation.

Since Equimark no longer owns stock of FSC, much less a controlling interest, events which occurred prior to the 1974 annual meeting when Equimark was a stockholder of FSC can hardly be considered a continuing course of action. Two annual meetings have taken place since those events. Therefore, the claim of possible future harm does not come within the ambit of Section 14(a) and Rule 14a-9 and cannot salvage this totally moot action.*

There never was a need to disclose anything with regard to Equimark insofar as an FSC annual meeting was concerned and plaintiff has never established to the contrary. Since Equimark is no longer a stockholder of FSC, Judge Carter was eminently correct in dismissing the amended

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* Kaye also appears to put forward the bootstrap argument that his failure at the 1974 annual meeting and again at the 1975 annual meeting to obtain approval for his proposals, and his consequent failure to include them in future proxy statements, require the continuation of this moot action. Appellant's Brief at 7-8. A moot lawsuit should not continue for the sole purpose of permitting a shareholder to resubmit proposals which have been rejected repeatedly.

complaint both as to Equimark and FSC. The time has come to put this litigation to rest.

Conclusion

For the reasons stated above, the District Court's order granting FSC's motion to dismiss should be affirmed in all respects.

Dated: New York, New York
January 21, 1977

Respectfully submitted,

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-and-	:	
EQUIMARK CORPORATION,	:	
Defendant.	:	

I HEREBY CERTIFY that on this 21st day of January, 1977, I served by personal delivery two copies of the Brief of Defendant-Appellee Funding Systems Corporation upon John M. Burns III, 200 East 42nd Street, New York, New York, counsel for Plaintiff-Appellant Richard S. Kaye.

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